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No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

HENKEL CORPORATION,

Petitioner,

versus

ROBERT E. TUCK,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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*James B. Spears, Jr.
Stephen D. Dellinger
HAYNSWORTH, BALDWIN,
JOHNSON & GREAVES, P.A.
901 West Trade Street, Suite 1050
Charlotte, NC 28202
(704) 342-2588

*Counsel of Record

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QUESTIONS PRESENTED

1. In resolving employment discrimination cases at the pretext stage under McDonnell Douglas*, should lower courts focus their inquiry on whether the employer "honestly believed" its own explanation for its employment decision?

2. In light of the Appeals Court's finding that a retained employee had greater qualifications than plaintiff, did the Fourth Circuit err in its failure to focus its pretext inquiry on whether the decisionmakers honestly believed their explanation for the employment decision?

3. In employment discrimination litigation, should lower courts and juries be allowed to "second-guess" an employer's business judgment?

4. Where there was no evidence of the decisionmakers' age bias, are age-based comments of non-decisionmakers "material" to a pretext analysis under Burdine* and Liberty Lobby*?

5. In evaluating evidence regarding pretext, did the Appeals Court err in failing to apply Liberty Lobby's requirement that Respondent's evidence be "significantly probative," particularly where there was no evidence of the decisionmakers' age bias in Respondent's layoff?

*McDonnell-Douglas Corp. v. Green, 411 U.S. 792 (1973).

Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248 (1982).

Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986).

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OPINIONS BELOW

Robert Tuck sued Henkel Corporation challenging his layoff from employment in March 1989, as a violation of the Age Discrimination in Employment Act (ADEA). Tuck's layoff resulted from management's selection of employee Mark Smith to serve in a reconstituted plant manager job.

Petitioner moved for summary judgment. After a hearing, the Trial Court granted the motion. (Pet. App. A-2 - A-49). On appeal, a three-judge panel of the Fourth Circuit Court of Appeals reversed the summary judgment, although it agreed with the Trial Court that the record evidence established that Smith had greater qualifications than Tuck.

JURISDICTION

The opinion and judgment of the Court of Appeals was entered on August 25, 1992. Tuck v. Henkel Corp., 973 F.2d 371 (4th Cir. 1992). (Pet. App. A-53 - A-75). Its decision denying rehearing was entered on September 24, 1992. This Petition was timely filed after the Petition for Rehearing was

denied. The Supreme Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS

This case arises under the Age Discrimination In Employment Act, 29 U.S.C. § 621 et seq. (Pet. App. A-136).

STATEMENT OF THE CASE

Henkel manufactures specialty chemical products for various business applications, primarily for the textile and paper industries. The Company operated two manufacturing facilities in Charlotte, North Carolina; one on Westinghouse Boulevard and the second on Sugar Creek Road. A workforce reduction occurred in March 1989. Before his layoff, Tuck was plant manager at the Sugar Creek facility. Brent Sears (age 50) was Tuck's supervisor. Sears had overall management responsibility for both manufacturing facilities. Sears' supervisor is Neville McDonald (age 50), Defendant's Vice President. (Pet. App. A-81 - A-83; A-85 - A-86; A-92 - A-93). Tuck was 59 at the time of the layoff.

In late 1988, Sears and McDonald anticipated that the future volume of chemicals needed from the Charlotte facilities would be significantly less than the past year. (Pet. App. A-108). Among other cost reduction measures,[1] McDonald and Sears decided to combine the Sugar Creek plant's technical and manufacturing responsibilities into a reconstituted plant manager position, and thereby eliminate a management level position as part of the workforce reduction. McDonald and Sears' business rationale was that the reconstituted plant manager job could help reduce the plant's day-to-day reliance on the Research and Development (R&D) Group for technical

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[1]For example, they reduced the manufacturing schedule from seven to a five-day schedule. They cancelled a manufacturing supervisory position and laid off additional employees which included: six (6) production operator jobs, a plant security guard, and one manufacturing manager. Also, various job functions and responsibilities were combined and/or eliminated to maximize available technical and management expertise. (Pet. App. A-81 - A-83; A-88 -A-90; A-108 - A-110).

support.[2] Thus, the R&D Group could concentrate more on its primary responsibility for new product development. (Pet. App. A-81 - A-83; A-94 - A-96; A-112).

After deciding to reconstitute the plant manager job, McDonald and Sears evaluated four (4) management employees based on each manager's technical ability, as represented by education and technical experience, and their individual job performance. McDonald and Sears decided that Smith's qualifications and his past work assignments at Henkel[3] best fit their goal for the reconstituted plant manager

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[2]The R&D Group was responsible for new product development; it's professional employees had chemistry degrees from at least the college level or higher. Prior to the 1989 layoffs, the Sugar Creek plant utilized the R&D Group for technical assistance in day-to-day manufacturing operations which reduced the time the R&D Group spent on new product development. Before the layoff, among the Sugar Creek manufacturing staff, there was limited chemistry or chemical engineering expertise including Tuck, who had no technical or college degree in chemistry. (Pet. App. A-84 -A-85).

[3]In 1974 Smith received his B.S. degree in chemical engineering from Purdue University. Two years later, Smith received his Master's degree in chemical engineering. Smith's (continued...)

position. (Pet. App. A-84 - A-85). McDonald and Sears were the only decisionmakers in selecting Smith for the reconstituted plant manager position and Tuck's layoff. (Pet. App. A-86; A-98; A-102; A-115 - A-117). Although Tuck argued that Robert Kahn was a decisionmaker in his layoff, there was no record evidence to support this argument.

Subsequently, Henkel purchased another chemical plant in South Carolina, a business change which led to a later decision to shut down entirely the Charlotte Sugar Creek plant. (Pet. App. A-115 - A-116). After McDonald decided to close the plant, Mr. McKillop (age 56) was assigned to oversee the shutdown. (Pet. App. A-103 - A-105; A-117 - A-119).

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[3](...continued)
employment with Henkel included a number of positions which required extensive technical and management background. These positions included: research engineer (2/1/77 - 12/1/80), pilot plant process engineer (12/1/80 - 12/1/84), process engineer (12/1/84 - 1/1/85), senior process engineer (1/1/85 - 10/1/87) and technical manager (10/1/87 -3/6/89). (Pet. App. A-84 - A-85).

In opposing Petitioner's motion for summary judgment, Tuck presented no evidence that either Sears or McDonald was motivated in any respect by Tuck's age. The Trial Court decided the motion under McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). Although the Trial Court anaylzed carefully Tuck's argument about his former supervisor's alleged age bias,[4] it decided Petitioner's motion should be granted. (Pet. App. A-2 - A-49).

On appeal, the Fourth Circuit reversed the lower court's decision. Significantly, the Appeals Court concluded: "[i]t is undisputed that Smith had better technical credentials than did Tuck." (Pet. App. A-69) (emphasis added). The Appeals Court concluded Henkel had met its burden under

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[4]Tuck did present evidence that one of his previous supervisors, Rudy Heer, had made age-based statements. (Pet. App. A-133 - A-136). However, the record evidence confirms Heer was not a decisionmaker in the workforce reduction. (Pet. App. A-86; A-98; A-102; A-115 - A-117; A-121). Also, although there was no evidence to support it, Tuck argued that Heer had influenced Sears' decision in his layoff. Sears testified his decision was made independent of Heer. (Pet. App. A-97 - A-98; A-100).

Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248 (1981), by explaining its decision to select Smith for the reconstituted plant manager job. Nevertheless, based on an awkward pretext analysis, the Appeals Court decided "Tuck has shown that Henkel's [business] rationale is unworthy of credence." (Pet. App. A-69).[5]

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[5]The Appeals Court relied upon three specific factual points to support its pretext analysis. First, based upon an affidavit from Marvin Thomas, a production supervisor under Tuck and later Smith, the Appeals Court questioned whether there was any difference--before and after Tuck's layoff--in the plant's actual day-to-day reliance on the R&D Group for technical assistance. (Pet. App. A-69). Second, the Appeals Court noted that about a year after Tuck's layoff, Smith was replaced by a production superintendent, Mr. McKillop, who, it observed, had "no more technical background than Tuck had...." (Pet. App. A-70). Third, after Tuck's layoff, the Appeals Court described Smith as "a poor [plant] manager with little knowledge of or interest in running the plant." (Pet. App. A-70). Significantly, nowhere in its decision did the Appeals Court evaluate the employer's "honest belief" in its reasons for selecting Smith.

REASONS FOR GRANTING CERTIORARI

I. THE APPEALS COURT FAILED TO FOLLOW THIS COURT'S REQUIREMENTS IN ANDERSON v. LIBERTY LOBBY, INC. IN EVALUATING TUCK'S PRETEXT EVIDENCE.

The Appeals Court recognized that Petitioner successfully met its Burdine burden of explaining Tuck's non-selection for the reconstituted plant manager job. In fact, the Appeals Court confirmed the record evidence supporting the management decision: "It is undisputed that Smith had better technical credentials than did Tuck." (Pet. App. A-69) (emphasis added). Under Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986), Tuck had to show that there is a dispute "over facts that might affect the outcome of the suit under the governing law." (emphasis added). In employment discrimination cases, this Court's governing law recognizes that when an employer advances specific reasons for a challenged employment decision, a plaintiff's pretext evidence must focus on those specific reasons. Burdine, 450 U.S. at 256 (1981).

None of Plaintiff's evidence purports to undermine Smith's greater qualifications or the honesty of the decisionmakers' belief in their uncontradicted explanation for Smith's selection. Contrary to Burdine, the Appeals Court's pretext analysis in this case focuses on the wrong facts; facts unrelated to management's evaluation of Smith's or Tuck's qualifications. The facts relied upon by the Fourth Circuit do not create a jury issue as to management's honest belief in Smith's greater qualifications.

A. The Fourth Circuit's Pretext Analysis Conflicts With Other Circuits' Correct Analysis.

The Fourth Circuit's pretext analysis did not address the employer's belief in the reasons it had set forth for selecting Smith; rather, the Appeals Court's focus was on the employer's rationale underlying its business judgment to reconstitute the plant manager position. (Pet. App. A-69). The difference between these divergent analyses is more than theoretical. The "honest belief" analysis is entirely consistent with Burdine, the business rationale analysis is contrary to it.

Other circuit courts have recognized the specific inquiry which must be made before summary judgment is foreclosed on a pretext issue. For example, the Seventh Circuit has long recognized that a court's focus must be on whether the employer believed in the reasons it has offered for its employment decision. In Mechnig v. Sears, Roebuck & Co., 864 F.2d 1359, 1365 (7th Cir. 1988), the appeals court analyzed its prior decisions and explained the important distinction between business mistakes and legally significant pretexts:

> [W]e do "not sit as a super-personnel department that reexamines an entity's business decision." No matter how medieval a firm's practices, no matter how high-handed its decisional process, no matter how mistaken the firm's managers, [the ADEA does] not interfere. Rather, our inquiry is limited to "whether the employer gave an honest explanation of its behavior."

(emphasis added) (citations omitted). The Mechnig court affirmed summary judgment in an age discrimination case

where the court found that plaintiff's evidence failed to address the honesty of the employer's belief in its explanation.[6]

Like the Seventh Circuit, other circuit courts have correctly adopted the proper pretext analysis. In Gray v. New

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[6] In McCoy v. WGN Continental Broadcasting Co., 957 F.2d 368, 373 (7th Cir. 1992), the Seventh Circuit emphasized the correct pretext analysis in upholding summary judgment in an age discrimination case:

> Ultimately, however, this court concludes that [plaintiff's] efforts to ward off summary judgment by showing pretext bear more on the issue of mistake on [the employer's] part than on the issue of whether WGN honestly believed in the reasons it has offered for its actions.
>
> . . .
>
> Thus, the issue of pretext does not address the correctness or desirability of reasons offered for employment decisions. Rather, it addresses the issue of whether the employer honestly believes in the reasons it offers. Visser, 924 F.2d at 658-59 (even firing for unethical reason is not evidence of age discrimination).

(emphasis added). See also, Gustovich v. AT & T Communications, Inc., 972 F.2d 845 (7th Cir. 1992) (summary judgment affirmed in ADEA case); Williams v. Williams Electronics, Inc., 856 F.2d 920 (7th Cir. 1988) (summary judgment affirmed in race discrimination case).

England Tel. and Tel. Co., 792 F.2d 251, 256 (1st Cir. 1986), the First Circuit recognized that in evaluating pretext, a court's "focus must be on the perception of the decisionmaker." (emphasis added). Later, in Mesnick v. General Electric Co., 950 F.2d 816, 824 (1st Cir. 1991), cert. denied, ___ U.S. ___, 112 S. Ct. 2965 (1992), the First Circuit again emphasized that in focusing on the decisionmaker's perception, the required inquiry is "whether the employer believed its stated reasons to be credible." (emphasis added)(summary judgment affirmed in ADEA case). The Second Circuit in Meiri v. Dacon, 759 F.2d 989, 997 (2nd Cir. 1985), cert. denied, 474 U.S. 829 (1985), has also circumscribed its pretext inquiry consistently with other circuits. In finding insufficient evidence of pretext, the appeals court affirmed summary judgment for an employer where it found the record evidence confirmed the employer's "honest belief that [plaintiff's] job performance simply did not

measure up to that required [by the employer]." (emphasis added).

The Eleventh Circuit has adopted the same analysis for evaluating pretext as the First, Second and Seventh Circuits. In Elrod v. Sears, Roebuck & Co., 939 F.2d 1466, 1470 (11th Cir. 1991), the court summarized that circuit's consistent application of the correct legal analysis:

> The inquiry of the ADEA is limited to whether [the decisionmakers] believed that [plaintiff] was guilty of harassment, and if so, whether this belief was the reason behind [his] discharge. See Hawkins v. Ceco Corp., 883 F.2d 977, 980 n. 2 (11th Cir. 1989), cert. den., ____ U.S. ____, 110 S.Ct. 2180, 109 L.Ed.2d 508 (1990) (That the employee did not in fact engage in misconduct reported to the employer is irrelevant to the question whether the employer believed the employee had done wrong.). . . "[F]or an employer to prevail the jury need not determine that the employer was correct in its assessment of the employee's performance; it need only determine that the defendant in good faith believed plaintiff's performance to be unsatisfactory...." Moore v. Sears, Roebuck & Co., 683 F.2d 1321, 1323 n. 4 (11th Cir. 1982) (emphasis in original). See also Jones, 874 F.2d at 1540; Smith v. Papp Clinic, P.A., 808 F.2d 1449, 1452-53 (11th Cir. 1987).

In stark contrast to these other circuit courts, the Fourth Circuit's pretext analysis here focuses on facts--even if true--which do not relate to the honesty of the employer's belief in its reasons for selecting Smith. Particularly where the Appeals Court relies on after-the-fact comparisons to second-guess Henkel's business rationale, its pretext analysis lacks internal logic and will lead to inconsistent results under Burdine and the ADEA.

B. The Fourth Circuit Mistakenly Relies On Evidence Not Related To The Company's Explanation Of Smith's Selection In Finding Pretext In The March 1989 Layoff.

For its pretext analysis, the Appeals Court focused on management's business rationale; i.e., its desire to have a more technically proficient manufacturing manager. (Pet. App. A-69). Allowing Tuck on appeal, and a jury below, to question management's business judgment on whether it needed greater technical expertise in the reconstituted plant manager job is not the purpose of the ADEA and is inconsistent with this Court's holding in Burdine. It

accomplishes nothing under Burdine for the Fourth Circuit to question management's judgment or its business rationale. Indeed, it supplants Burdine's logic to allow the factfinder to roam the evidentiary field to garner a factual dispute to justify a pretext in business logic.

The Fourth Circuit relied upon three evidentiary points to support its conclusion "that Henkel's rationale is unworthy of credence." (Pet. App. A-69) (emphasis added). (See Footnote 5, supra). The Appeals Court relied on Thomas' observation that the plant's operation had not changed vis-a-vis its reliance on the R&D Group's technical expertise, before and after Smith actually began performing his new assignment. The Appeals Court's focus is clearly shown by its observation:

> Even so, it is relevant to consider in assessing the credibility of Henkel's story, that . . . after the R&D Group was relieved of the "burden" of supporting a technically deficient Tuck it helped the plant no less than before and the number of new products it developed was no greater than previously [before Smith].

(Pet. App. A-70) (emphasis added). Whether or not management's business goal was actually achieved after-the-fact says nothing at all about whether management honestly believed it selected the best qualified candidate before-the-fact. Significantly, there is no record evidence that connects Thomas' "before and after" observation with any decisionmaker (Sears or McDonald) for Tuck's layoff.[7]

The same logic applies to the Appeals Court's reliance on Thomas' observation that led the Appeals Court -- not the management -- to conclude that "Smith was a poor [plant] manager with little knowledge of or interest in running the plant." (Pet. App. A-70). Even if Smith thereafter proved to

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[7]Hypothetically, if the Thomas affidavit had reflected he had heard Sears say, for example, that the Company really did not need Smith's greater technical qualifications, such testimony could support a pretext analysis regarding the honesty of Sears' belief in the explanation he put forth in this litigation. Of course, the absolute absence of any such "nexus" evidence in this case reveals the Thomas affidavit for what it is, merely one employee's after-the-fact observations that raise no inferences at all -- and certainly not a reasonable inference -- regarding whether or not Sears and McDonald honestly believed their reasons for selecting Smith.

be a poor selection for the reconstituted job, such evidence sheds no light on the question of management's honest belief about his qualifications before he was selected. Can management make a mistake in judgment without violating the ADEA? Compare McCoy, 957 F.2d at 373-74 (court rejects plaintiff's evidence because it shows possible management mistakes, not pretext).[8]

The Appeals Court's erroneous approach is more clearly revealed by its comparison of qualifications between a later plant superintendent, Mr. McKillop, and Smith. (Pet. App. A-63). This after-the-fact juxtaposition can raise no inference about possible pretext for a 1989 layoff decision

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[8]Because neither of these Thomas' observations could have been observed or known by management before Smith actually began his new assignment, they cannot logically be used to correctly address the pretext issue in making management's earlier decision to select Smith over Tuck. To allow otherwise can only mean that decisionmakers must not only be honest, they must always be absolutely right in their business judgment. The ADEA does not require any such level of business "success."

made before the later decision to close the plant and assign McKillop in 1990 the different role of closing down the plant. (Pet. App. A-101; A-103 - A-105; A-117 - A-119).[9] Without any nexus evidence connecting McKillop with the preceding layoff decision, the Fourth Circuit's juxtaposition is inconsistent with the logic of Burdine because, in this case, it says nothing about management's evaluation of Smith's

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[9]Whatever McKillop's qualifications may have been, it makes no difference insofar as showing pretext for the March 1989 layoff decision, particularly where the record evidence confirms that McKillop's assignment was for a different business purpose, to manage the plant's total shutdown. (Pet. App. A-101; A-103 - A-105; A-117 - A-119):

> Qualification obviously depends on the nature of [the] business at any given time. One year an outgoing business-getter type might be best qualified, while in the next, after the business was got, it might be a cloistered scientist or mathematician. To ignore the shifting nature of qualification from time to time would make the qualification requirement meaning-less. . . .

Kephart v. Institute of Gas Technology, 630 F.2d 1217, 1219 (7th Cir. 1980), (emphasis added), cert. denied, 450 U.S. 959 (1981). See also Dorsch v. L.B. Foster Co., 782 F.2d 1421, 1425 (7th Cir. 1986).

admittedly greater qualifications. Further, such reasoning demonstrates nothing more than the Fourth Circuit belief that a jury should be allowed to second guess the wisdom of Henkel's management decisions, independent of Smith's or Tuck's qualifications at the time the layoff decision was made in early 1989.

C. The Fourth Circuit's Decision Sanctions Juries In "Second Guessing" Employers' Business Judgment Under The ADEA.

The Supreme Court has yet to hold in a discrimination case that a court or jury cannot second-guess an employer's business judgment. Several courts of appeal, however, have endorsed this critical proposition in analyzing summary judgment motions. For example, in Thornbrough v. Columbus & Greenville Railroad Co., 760 F.2d 633, 647 (5th Cir. 1985), the court held:

> Of course, the issue in this case is not whether [plaintiff] or the retained employees were better qualified. The [employer] is entitled to make that decision for itself. The ADEA was not intended to be a vehicle for judicial second-guessing of business decisions, nor was it

> intended to transform the courts into personnel managers.

(citation omitted) (emphasis added).[10] Similarly, in Kephart, 630 F.2d at 1223,[11] another appeals court has recognized:

> The Age Discrimination in Employment Act, however, was not intended as a vehicle for judicial review of business decisions. The question before the court is not whether the company's methods were sound, or whether its dismissal of Kephart was an error of business judgment.

(citation omitted).

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[10]See also Guthrie v. Tifco Industries, 941 F.2d 374, 378 (5th Cir. 1991), cert. denied, ___ U.S. ___, 112 S. Ct. 1267 (1992) (summary judgment affirmed in age case citing Thornbrough); Amburgey v. Corhart Refractories Corp. Inc., 936 F.2d 805, 814 (5th Cir. 1991)(summary judgment affirmed in age case citing Thornbrough).

[11]Other Seventh Circuit decisions have consistently applied Kephart's analysis in summary judgment cases to distinguish between proper and improper evidence of pretext. See McCoy, 957 F.2d at 373 (7th Cir. 1992); Gustovich, 972 F.2d at 848 (7th Cir. 1992); Lindsey v. Baxter Healthcare Corp., 962 F.2d 586 (7th Cir. 1992), cert. denied, ___ U.S. ___, 113 S. Ct. 442 (1992); Mechnig, 864 F.2d at 1365 (7th Cir. 1988); Bechold v. IGW Systems, Inc., 817 F.2d 1282, 1285 (7th Cir. 1987).

Likewise, the Second and Third Circuits have foreclosed lower courts and juries from second-guessing employers' business rationales. See Parcinski v. Outlet Co., 673 F.2d 34, 37 (2nd Cir. 1982), cert. denied, 459 U.S. 1103 (1983) ("The [ADEA] does not authorize the courts to judge the wisdom of a corporation's business decisions."); Healy v. New York Life Ins. Co., 860 F.2d 1209, 1216 (3rd Cir. 1988) ("[O]ur inquiry must concern pretext, and is not an independent assessment of how we might evaluate and treat a loyal employee.")

In opposing summary judgment, Burdine's requirement that a plaintiff produce evidence which raises a genuine issue regarding the employer's specific explanation for a challenged employment decision negates the risk that a jury or court will substitute its judgment for the employer's business concerns. If lower courts are free to rely on any evidence which, for example, may second guess an employer's business rationale underlying an employment decision, summary judgment could

never be granted in discrimination cases. Almost every plaintiff could present evidence that may suggest that a different business judgment could have been made, particularly if--as was done here-- after-the-fact evidence is relied upon. However, the possibility of a different business judgment does not address the central question of whether there is significant and probative evidence that illegal discrimination was involved in a challenged employment decision.

II. THE APPEALS COURT ERRED IN CONCLUDING TUCK'S EVIDENCE CAN SUPPORT A VERDICT OF AGE DISCRIMINATION UNDER RULE 56.

In Liberty Lobby, the Supreme Court made clear that:

> [T]he mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no genuine issue of material fact.

477 U.S. at 247-248 (emphasis in original).[12] Uncontradicted

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[12]For a dispute to be "genuine," the evidence must be "such that a reasonable jury could return a verdict for the nonmoving party." Id. at 248. Indeed, such evidence must be "significantly probative." Id. at 249-50. "Only disputes over (continued...)

record evidence confirms that only Sears and McDonald made the management decision to select Smith over Tuck for the reconstituted plant manager position. (Pet. App. A-86; A-98; A-102; A-115 - A-117; A-121). Tuck presented no evidence creating any factual dispute on this threshold point. Thus, for Tuck's evidence to be significantly probative as required by Liberty Lobby, such evidence should involve actions or statements of these two officials, not evidence of non-decisionmakers! See Mechnig, 864 F.2d at 1366 (evidence of pretext requires evidence of actual decisionmakers). Significantly, none of the facts relied upon by the Appeals Court regarding a possible age motivation against Tuck involve either McDonald or Sears.

Examination of the Appeals Court's factual analysis reveals that the court's inference of age discrimination is

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[12](...continued)
facts that might affect the outcome of the suit will properly preclude the entry of summary judgment." Id. at 248 (emphasis added).

unsupported by record evidence. This error is best demonstrated by the Appeal Court's conclusion that Tuck's evidence of a note handwritten by Kahn created a question as to whether Kahn was a decisionmaker in Tuck's layoff.[13]

Notwithstanding the uncontradicted evidence, the court accepted Tuck's "argument" that the phrase "our plan" creates an inference that Kahn participated in a "plan," not only to get rid of Tuck, but to do it because of his age! This doubly speculative argument cannot begin to provide the "significantly probative" evidence required by Liberty Lobby.

Kahn explained, also without contradiction, that his word plan did not refer to any plan directed at Tuck. The

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[13]In reaching this conclusion, the court sidestepped uncontradicted evidence from three witnesses that Kahn was not a decision maker. As a corporate level Human Resource Manager, Kahn explained "I did not make the decision. Human resource people do not make decisions regarding terminations." (Pet. App. A-121). Also, Sears and McDonald, who actually made the decision, both testified Kahn was not a decisionmaker. (Pet. App. A-86; A-98; A-102; A-115 - A-117).

only record evidence about this note clearly explained the meaning of "plan":

> Q What did you mean by "Based on our plans?" What are "our plans?" What does that mean?
>
> A By "our" I guess I meant Henkel's plans. By the time I wrote this note we knew that we had to reduce expenses in the Charlotte area and that we would have to have a reduction in force. And we also knew that there was a possibility that this could affect Mr. Tuck somewhat. It could result in his position being changed. It could result in his termination. That decision had not been made. In light of the fact that his position might go to a different position, I was asking to reconsidering the appropriateness of a salary increase. To me, at this time, was the question. And the "plans" related to plans of reduction in force that could affect many, many people in the organization.
>
> Q Was there any particular plan for Mr. Tuck compared to any other employees?
>
> A No, sir.

(Pet. App. A-122 - A-124) (emphasis added). No evidence contradicts this explanation. Argument alone cannot do it. Where there was no other evidence about the meaning of

"plan" in Kahn's note, the court improperly relied on this note in reversing summary judgment.[14]

Even more important, nowhere in Kahn's note is there any mention of Tuck's age or any age-related factors. Therefore, absent a justifiable inference relating to age, a jury issue arises only if Tuck's argument is accepted as "evidence." Liberty Lobby forecloses that result.[15]

The record evidence also confirms the Appeals Court's error in concluding that Sears' and McDonald's explanation of

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[14]Of course, without a jury issue about Kahn being a decisionmaker, any court's consideration of Heer's alleged influence over Kahn is unfounded. Tuck's argument that Kahn was a decision maker is the only "bridge" which can possibly connect the Fourth Circuit's clear suspicion of Heer's alleged age bias. Without this bridge, Heer's alleged bias (even if true) presents nothing for a jury to consider. See Gunter v. Coca-Cola Co., 843 F.2d 482, 483-84 (11th Cir. 1988), reh'g denied (en banc), 851 F.2d 364 (11th Cir. 1988).

[15]Rule 56(e) makes clear that the nonmoving party ". . .may not rest upon mere allegation . . . . [T]he plaintiff must present affirmative evidence in order to defeat a properly supported motion for summary judgment." 477 U.S. at 256 (emphasis added).

when they decided to include Plaintiff in the layoff was "arguably incredible." (Pet. App. A-73). McDonald and Sears testified that they made the decision shortly before March 1989. (Pet. App. A-98 - A-99; A-111). This uncontradicted record evidence confirms that Sears and McDonald had not made their decision to lay off Tuck when Kahn wrote his note in early January 1989; Kahn's testimony also confirms it: "That decision [to select Tuck for layoff] had not been made." (Pet. App. A-123) (emphasis added). In attempting to contrast the testimony of Kahn with that of Sears and McDonald on this point, the court compounded its error when it observed:

> . . . Kahn stated that he knew that Sears was considering firing Tuck when Kahn wrote the note [in early January 1989]. Tuck argues that this is reason to doubt Sears' and McDonald's story that they were the real decision makers, since they claimed not to have decided to fire Tuck until fully two months later.

(Pet. App. A-59) (emphasis added). Something is missing here! "When" the decisionmakers actually made a final

decision says nothing about whether or not they (or anyone else) were the real decisionmakers.[16] Additionally, Kahn's knowledge about what Sears was considering hardly makes Kahn a decisionmaker. That Human Resource officials frequently are aware of decisionmakers' pre-decision deliberations should not surprise anyone and certainly does not provide a basis for a jury to decide the decisionmakers' motivation!

The Fourth Circuit's strained analysis to find any inconsistency is not supported by any record evidence. That Tuck "argues" for contrary inferences does not make them justifiable inferences. Under Liberty Lobby, Rule 56(e) requires a nonmoving party to come forward with "affirmative

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[16]Kahn's testimony does not say that Kahn knew Sears and McDonald had already made a decision regarding Tuck's layoff. Without evidence establishing this point, the court's conclusion that there is any inconsistency in the evidence is not only entirely speculative, it is wrong! (If there had been such evidence, the court's conclusion might be reasonable.) However, since Kahn's testimony cannot logically be construed to support this premise, the inference necessary for any court to accept Tuck's argument must fail.

evidence,"--not merely conclusory allegations--which is "significantly probative."[17] 477 U.S. at 249-50.

CONCLUSION

The Fourth Circuit's decision reversing summary judgment reflects a pretext analysis incompatible with other circuits, Burdine and Liberty Lobby. Its decision should be reviewed and reversed by this Court.

Respectfully submitted,

HAYNSWORTH, BALDWIN,
JOHNSON AND GREAVES, P.A.

By: James B. Spears Jr.
James B. Spears, Jr.

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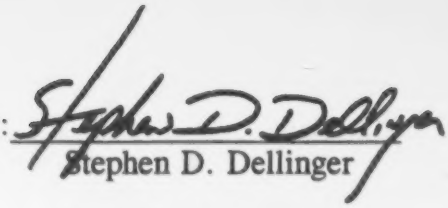
[17]Due to the Petition's page limitation, Petitioner cannot include each example of how the record evidence contradicts the Fourth Circuit's analysis. For example, Petitioner never relied upon a pension cost justification in this case. Nevertheless, for no apparent reason, the Fourth Circuit decided that a "jury should be given the opportunity to consider such a policy as evidence of age discrimination." (Pet. App. A-71).

By: 
Stephen D. Dellinger

Gateway Center, Suite 1050
901 West Trade Street
Charlotte, NC 28202
(704) 342-2588

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